UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In Re: Bard IVC Filters Products Liability Litigation	MD-15-02641-PHX-DGC
	Phoenix, Arizona
	August 23, 2016

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FIFTH SCHEDULING CONFERENCE

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10:01:31

P R O C E E D I N G S

THE COURTROOM DEPUTY: MDL 15-2641, In The Bard IVC Filters Products Liability Litigation, on for scheduling conference. Will the parties please announce.

10:01:04

MR. BOATMAN: Good morning, Your Honor.

Bob Boatman, Ramon Lopez, and Paul Stoller for the plaintiffs. We also have several other attorneys either appearing by phone or perhaps here personally, depending upon the issues the Court wants to address this morning. Thank you.

10:01:20

THE COURT: All right. Good morning.

MR. LOPEZ: Good morning.

MR. STOLLER: Good morning, Your Honor.

10:01:27

MR. NORTH: Morning, Your Honor. Richard North on behalf of the defendants, and I have with me Jim Condo and Matthew Lerner, and also from my office Ms. Taylor Daly.

THE COURT: All right. Good morning.

Counsel, I've been through your joint status report

10:01:45

and I just want to talk through the issues that are identified, and I think we can resolve virtually all of the issues in the joint status report this morning.

So I think we should dive right in. The update that you provided on fact discovery is helpful. It looks like

10:02:01

you've made progress on depositions. I didn't see any issues

that you need me to address on general fact discovery. Are there any items besides those raised later in the report that we need to address?

MR. LOPEZ: As far as deposition, Your Honor, there's someone that the plaintiffs need to depose by a certain date. Mr. North and I had a -- we were hoping that maybe you could weigh in on this, but Mr. North and I have had a conversation that this particular corporate witness I guess might have some health problems so I agreed to take three or four hours. So as long as we can get this before a date at the end of September when an expert is being deposed in a case that we're coordinating with the MDL, which may likely be the first trial. That's Natalie Wong. We just want to bring that to the Court's attention. Hopefully we won't have to bother you with it again. But it is someone we've been seeking since early July and it's now almost the end of August. This expert's being deposed at the end of September. We were not offered a date until October. So we wanted to bring that to the Court's attention. Hopefully, Mr. North and I can work that out. If so, we won't have to bother the Court again. If not, we may have to involve you in a telephone call to maybe give some encouragement to have this witness produced before September 29th.

THE COURT: Mr. North, any comments?

MR. NORTH: Your Honor, I would just state for the

10:03:30 record that it was only 12 days ago that they gave us the showing required by CMO 8 to take a deposition, new deposition, of someone who's already been deposed before. I've been asking for that for several weeks.

10:03:43 They've given me that showing. We're working with Mr. Lopez and seeing if we can work that out.

THE COURT: All right. If there's an issue that comes up, call me. If when you call you need a decision literally within a day or two -- well, don't put it off. But

10:03:58 if you get to that point, tell my staff that when you call and I'll make sure we get you on the phone and we'll resolve it.

MR. LOPEZ: Your Honor, that brings up an issue, though, with respect to that witness. This was a witness that was deposed six years ago, not by anyone that's on the PLC.

10:04:19 It falls within the purview of your order about prior depositions, showing good cause. She was deposed for two hours with two documents. We asked for the deposition July 9th.

I just -- it would be nice if we can get some

10:04:32 guidance from the Court that in a circumstance like that, there shouldn't be a dispute that the plaintiffs have a right to depose someone, especially someone who has been involved in this case or with this product for five, ten, 15 years.

Again, July 9th we said we wanted her deposition. I

10:04:55 guess they've been waiting for us to show them good cause.

But I think that if they would have just checked the transcript, they would have seen she was deposed for 90 pages, two documents, and a very confined period of time, where she's been involved for over a decade on the product.

THE COURT: Well, Mr. Lopez, I'm reluctant to weigh in on what will be fact-specific issues with respect to particular witnesses. What you say makes it sound like good cause, but that's also a very easy thing to show when you request the deposition.

So if there's a disagreement, I would ask you communicate promptly. If defendants don't think the showing has been made, make a showing. And if there's then a disagreement as to whether the showing is insufficient, call me. But that seems to me to be a very fact specific issue and I ought not to try to draw lines now based on it. You ought to just communicate quickly about those issues.

MR. LOPEZ: Yes, Your Honor.

MR. NORTH: For the record, so I can make this clear, once they provided us the showing we requested, we agreed and there is no issue about putting her up. We agreed three days after they made that showing. And the only issue right now is timing.

THE COURT: Okay. Let me know if there's a timing issue on that witness.

Let's talk next about the bellwether selection issue

that is on page 3 or begins on page 3 of the report. I do want to resolve this issue today.

As you've all noted under Case Management Order Number 11, which, incidentally, contains language that you all stipulated to, if a plaintiff declines to give a *Lexecon* waiver, then it says on the bottom of page 2 and the top of page 3, that plaintiff or his/her counsel shall show cause why a *Lexecon* waiver is not being made and I'm to address it at that point.

So I think we ought to hear from counsel for those two plaintiffs as to why the *Lexecon* waiver is not being made. And I understand the plaintiffs are Froelich, F-R-O-E-L-I-C-H, and Delbrugge, D-E-L-B-R-U-G-G-E.

Who is the plaintiffs counsel who wishes to address that?

MR. STOLLER: Let me step up, Your Honor. May I take the podium?

THE COURT: Please.

MR. STOLLER: I believe on the phone you've got both Troy Brenes, who is counsel for Ms. Froelich, and Teresa Toriseva, who is counsel for Ms. Delbrugge.

What I would like to give you, Your Honor, is a bit of the background before each of them speak.

I was responsible on behalf of the plaintiffs team for organizing the bellwether process. Probably not a

10:07:44 surprised to you since I'm the person who's spoken about that mostly in this courtroom to date.

What we did, Your Honor, is we told literally every plaintiffs lawyer and every counsel who had a case that was 10:07:55 selected by either side, we want you to waive bell- -- we want you to waive *Lexecon* no matter what, if you can. If your client is asking questions about merits, should they, we want you to encourage them to waive.

I think we were highly successful in that in the 10:08:11 first go-round from the defense selections. I think they made 24. We had 20 waivers out of the 24. And of the four remaining, three of them, they agreed that the *Lexecon* waivers were for good cause, in particular because those plaintiffs had health issues. It came down to -- they then selected 10:08:28 three replacements. Two of those waived.

I can avow to this Court, Your Honor, we've made every effort as leadership to ask folks to waive and not to use *Lexecon* as a tool to select cases, which was one of the concerns we had, I think universally, when we talked about the 10:08:49 bellwether process several months ago.

If you'll recall, I advocated strongly that we needed to try to get bellwether -- excuse me, *Lexecon* waivers done either before we started picking cases or at the end, but not in the middle where there would be some accusations of 10:09:05 self-selection and trying to game the process. I didn't want

those accusations.

It seems to me that that's what's really at issue here is whether we're trying to game the system to try to remove cases that we think are bad for us, either because they're -- on the merits they have some problems or there's some valuation issue there. I can assure you, Your Honor, that's not what happened here.

Whatever the reasons, whether for personal -- personal problems, inability to travel, or just because they didn't want to come to Arizona to have their trial, that's not what happened here. Whatever reasons those plaintiffs have, they're not about merits at all. I can assure you that. I talked to every lawyer involved, and I requested specifically, if you can get your clients to waive, please waive. We don't want to have an issue.

And with that, unless you have any questions of me, I just wanted to give you the overarching framework. I think we were very successful. Very high percentage of waivers. If you ask anybody who has MDL experience, when you get 80 something percent of people who are waiving *Lexecon*, that's a pretty high number.

THE COURT: Okay. Thank you.

Do we have counsel for Plaintiff Froelich on the phone?

MR. BRENES: Yes, Your Honor. This is Troy Brenes

10:10:21 for Ms. Froelich. Following up on what Mr. Stoller said, the plaintiff in this case lives in Florida. She's a relatively young mother with a child that lives at home with her. It would be extremely difficult for her to fly up to Arizona for 10:10:33 three, four weeks and arrange care for her son.

The other issue, she's extremely distraught emotionally about what happened with the filter and just generally it's still affecting her. And exposing her to a trial, obviously she is concerned about the stress and the 10:10:52 additional stress that that's going to cause and she really, if this thing is going to go to trial, needs her support network around her. Friends, family. And that's really the reason. It's the emotional distress, the emotional toll it's going to take to do this trial. She needs to have her support 10:11:12 network around her. Aside from the child care issues.

THE COURT: Okay. Thank you.

MR. BRENES: Your Honor, I would add, defense counsel has a large number of other cases in mind as well where I'm sure they see issues and I have plenty of other plaintiffs who 10:11:28 would not be opposed to waiving *Lexecon*. It's just this one plaintiff has particular concerns.

THE COURT: Okay. Thank you, Mr. Brenes.

Do we have counsel for Plaintiff Delbrugge?

MS. TORISEVA: Yes, Your Honor. This is Teresa 10:11:47 Toriseva for that plaintiff.

10:11:47 THE COURT: All right.

MS. TORISEVA: Your Honor, she -- my client in this situation has three primary reasons. Really one is the primary and the second and third are truly not as important 10:11:59 from her perspective.

I want to let the Court know that I have six other clients that were selected in the bellwether process who were asked to waive their *Lexecon* rights and did do that. And I offer that to the Court, frankly, I guess, as a showing of 10:12:19 good faith from counsel, to be candid.

But, Your Honor, with regard to Ms. Delbrugge, she is from Hawaii. She is 72 years old. Her main concern, and this is my surmising, Your Honor, but the first and second kind of go hand in hand. She has two great grandchildren for whom she 10:12:40 is primary caretaker when their both parents work. When their parents are at work. They're in a two-parent home, but both parents work outside of the home to pay bills and support the family.

And in addition to that, Ms. Delbrugge works 10:12:56 part-time at Wal-Mart locally there and has a schedule. When she isn't working, she's with her great grandchildren. And vice versa.

She's very fearful that if she's gone out of the area and not able to take any shifts for a three- or four-week 10:13:10 period she would, one, lose her job, and, not just the time,

she understands that that could happen, the time loss, no matter where the trial is, but she is fearful she would lose her job at Wal-Mart and she's also fearful about the primary care situation for her two great grandchildren who are ages 3 and 8.

She does have some health problems, Your Honor, but -- and she hasn't traveled since 2002. But when you ask her about that she really comes back to the main reason she doesn't travel and can't is her family commitment and her work.

She is prediabetic and takes some -- couple medications to manage a couple conditions. But for 72 generally does do -- does okay. Certainly has some limitations. And that would be her third consideration, Your Honor, although really incidental compared to one and two when you talk with her, which I have personally on several occasions to go through this. Including going back to her after speaking with Mr. Stoller and sort of urging her and making sure, talking it through, and she just really is struggling to get past her concern for her great grandchildren combined with her job.

THE COURT: Okay. Thank you.

MS. TORISEVA: Thank you, Your Honor.

THE COURT: Mr. North, you want to address this?

MR. NORTH: Yes. May I approach, Your Honor?

10:14:41 THE COURT: Yes. Pull the mic over a bit, would you. Thanks.

MR. NORTH: Turning first to Ms. Froelich, I think it's very important to note at the outset, Your Honor, that 10:14:49 she was the patient featured in the two NBC broadcasts that came out last September.

She also, as way of background, had her filter implanted 12 years ago. She had her filter removed 12 years ago, according to the medical records we've seen. She had a 10:15:08 strut that fractured and had that removed 12 years ago, according to what we've heard.

Your Honor, based on the evidence we've seen, it appears to us that the reasons she states for not waiving *Lexecon* may be somewhat pretextual. And I say that because of 10:15:29 this: She cites the fact she is a single mother of children. According to the information we have, she has two children. The youngest is either 15 or 16 and lives with her. The oldest is 22 or 23 and lives nearby. We understand her ex-husband lives in the same city and nearby.

10:15:49 As far as the justification that she has severe emotional distress, we question that only because, Your Honor, all of this happened 12 years ago and, according to the records and information we've been given, and we've been given some medical records by the plaintiffs concerning this 10:16:04 particular case, we haven't seen evidence yet of any

10:16:07 complication, and I would suspect there isn't one since the filter and the strut itself were removed 12 years ago.

In this particular case, Your Honor, we're very concerned that the decision not to waive *Lexecon* has strategic 10:16:23 reasons behind it. Perhaps from Ms. Froelich herself.

We know from a fact from looking at her medical records that we do have that many of the representations she made to NBC and that were aired throughout the country are simply not true. And those that are true are exaggerated.

10:16:42 We also are concerned because, as the Court knows and will address as another issue, we've been trying to obtain discovery about the contacts of the plaintiffs' counsel with NBC. If Ms. Froelich is a bellwether, that's going to come out. And we're concerned that that is another reason that she 10:17:00 has not waived *Lexecon*, to try to keep the veil on the plaintiffs' contacts -- plaintiffs' attorneys' contacts with NBC.

And lastly, Your Honor, as I said, all this happened 12 years ago. We have tried to pick two or three 10:17:14 representative cases out of our 24 that we think have clear statute of limitations issues to raise before the court and we believe she is -- her case is a very clear example of a statute of limitations issue.

So for those reasons, Your Honor, we are concerned 10:17:33 that the decision not to waive *Lexecon* in this case is being

made by -- for strategic reasons.

Turning to Ms. Delbrugge, I will say quite candidly, Your Honor, we don't have any reason to believe that her reasons for not waiving *Lexecon* are manufactured or are a pretext. The reason we originally decided to contest that and ask for a good cause showing was, unlike the three people that we readily agreed to because of severe health problems, Ms. Delbrugge's reasons for not wanting to appear are reasons that just about any potential bellwether will have: family obligations, travel, things -- jobs, things of that nature. And to some extent, and I will admit candidly this may be a slightly different situation since she is in Hawaii, but candidly we believe that if that's sufficient to exempt somebody from the *Lexecon* requirement here, then that will apply to virtually every plaintiff in the bellwether pool. That's our position.

THE COURT: Let me -- let me ask you this question, Mr. North.

As I read the *Lexecon* case itself, I have no authority to require either of these plaintiffs to have their cases tried in Arizona. The mandatory language of the statute says that I shall remand it back to their home district after the pretrial services. Now -- after the pretrial litigation.

Now, that can be waived by a party. But if a party doesn't waive it, I have no authority to order that party to

10:19:19 try their case in Arizona.

So when I'm faced with a situation where a party says I'm not waiving, and they provide a colorable explanation, even if the colorable explanation is disputed by you, what 10:19:32 authority do have I have to say, no, I don't accept your explanation, I'm ordering to you try your case in Arizona?

MR. NORTH: Your Honor, that's the conundrum. Absolutely. You do not apparently have the authority under *Lexecon*. I think there are many of us on my side of the V who 10:19:49 hope the Supreme Court changes that rule at some point. But as it stands, I agree.

Now, a number of the judges, however, have exacted a price or penalty for not waiving *Lexecon*. In some instances, you know, the defendants were allowed to substitute one person 10:20:06 in for the plaintiff's picks and remove one of the plaintiff's picks if good cause hasn't been shown.

In this particular case, Your Honor, I think I would ask for an unusual request. I would ask we be allowed to take a deposition of Ms. Froelich. Because her decision to waive 10:20:24 *Lexecon* is depriving us of some information that my client very much wants to know about this NBC broadcast and what prompted all of this publicity. And if she's decided not to waive *Lexecon* and try to shield herself, for whatever reason, from that, we would ask permission to take a deposition of 10:20:44 her.

10:20:45 THE COURT: For what purpose? You mean to revisit the issue of whether I'm going to accept or force her to waive *Lexecon*? Or just for discovery purposes?

MR. NORTH: For discovery purposes about her role in the NBC --

10:20:56 THE COURT: That's a different issue we're going to address today. I don't want to link that somehow to her *Lexecon* waiver because, frankly, if I were of the view that the plaintiffs were, to use Mr. Stoller's words, gaming the system and they were trying to use their *Lexecon* waiver in a way that would skew the bellwether pool, then perhaps it would be appropriate for me to be exacting some price. But where 20 of the original 24 and now, it appears, total of 22 plaintiffs, have waived *Lexecon*, it's hard for me to conclude they're trying to skew the pool.

So I want to address the NBC issue separately, not as part of the *Lexecon* waiver context.

But my conclusion is that both Plaintiff Froelich and Plaintiff Delbrugge have provided colorable reasons for not waiving *Lexecon*, and I don't think I have power to order them to waive *Lexecon* under the statute. And I can't conclude that plaintiffs are gaming the system. And so I'm not going to order them to waive *Lexecon*.

The question then is what do we do with those two remaining spots. I assume the right procedure is to follow

what the case management order says, Case Management Order 11, and have you designate two more.

MR. NORTH: Yes, we have substitute candidates ready to designate, Your Honor. We still have three or four months to collect medical records, so timing is not an issue.

THE COURT: All right. So let's continue down that road until we get those two slots filled, and then we'll have the initial bellwether pool we need.

MR. NORTH: I understand, Your Honor. I would just note that if we get to the place in this particular MDL of selecting a second group of bellwethers, the defense may want to relook at the *Lexecon* waiver issue and look at perhaps other mechanisms to do it in a second round. But we can address that at that time.

THE COURT: We'll cross that bridge when we get to it.

MR. NORTH: Thank you, Your Honor.

THE COURT: Okay. Thank you.

Let's talk about the next issue in the report, which is the ESI issue.

Frankly, Counsel, I thought that ESI production would be done by now and it's very concerning to me we are in late August and there's still substantial volumes of ESI to be produced. Particularly since our deadline in the fact discovery phase is October 28th, and I entered the orders

governing these matters in February, early March. So we've had months to get this problem solved.

My understanding is there are three categories of issues on ESI. One concerns ESI that's located in shared space in the defendant's computers. A second is the question of ESI related to international operations. And the third is ESI from two individuals, Ring and Weiland, W-E-I-L-A-N-D.

Let's talk first about the shared space ESI. You indicated in the report that you're still talking about this. Why don't you give me an update on where we are today on that issue.

MR. STOLLER: Your Honor -- Paul Stoller, for the record.

Your Honor, I had a conversation with Mr. North and Mr. Lerner yesterday. They asked me to hold two hours tomorrow morning at which point they're going to come to my office with their expert and present to me what they've articulated as a fairly comprehensive proposal with explanation of what they propose and, if I understood it correctly, and we were on the phone yesterday for about half hour addressing things in terms of where they propose -- from where they propose to collect the information.

One of the issues, Your Honor, and to the extent if it's not clear in our briefing, there are these shared locations where they have in different, depending on the

shared location, substantial -- differing volumes of substantial ESI. And the question from the get-go has been are they going to collect and search everything from those shared locations or are they going to take parts of it and say we're just going to gather the information that's here in this server and not the other information.

And as part of that, if you'll recall when we were back here, I want to say January or February talking about that, as I said to Your Honor, I need to understand what the locations are from which they're going to collect it and from where they're not going to collect it.

So there's been an ongoing debate between the sides about whether they're going to collect everything or collect just a portion of it.

My understanding is tomorrow they're going to tell me what their proposal is in terms of the portion, if it is a portion, of those different locations from which they're going to collect and then how they propose to use search terms, and actually it sounds like a combination or combinations of search terms, in a formulaic way or Boolean search through those to locate responsive documents.

My concern is as yours is, Your Honor. I said to them I'm fine to do anything that's -- frankly, fine to do anything that's reasonable but I've got two months left. And at the time this conversation came up two weeks ago when they

said they wanted to do it this way, I said that's fine but I would have liked to have had this conversation six months ago.

We need documents. We need to get moving.

They have been producing on a rolling basis the custodial documents but, at least according to their report, they've got a ton of stuff at least that's potentially to be searched in the common locations and we don't have it.

We've taken, I don't know, a dozen, maybe somewhere between 12 and 18 depositions already. We've got another 15 or 20 scheduled. What I really need are deadlines and I need stuff as soon as possible. That's my big concern. I don't want to push deadlines for discovery. We want to stay on the schedule this Court ordered originally and get these cases ready for expert discovery and then bellwether trials next year.

THE COURT: All right. Mr. North.

MR. NORTH: Thank you, Your Honor.

I understand the Court's frustration, I understand Mr. Stoller's frustration, and I share that frustration. We have been working very, very hard. We have spent hundreds of thousands of dollars and we are looking -- but we face an intractable problem. That is that these shared drives are huge. One of them alone has over 500 million documents.

And I'm going to be very candid with Your Honor. We have worked with our vendor and worked with our vendor to try

10:27:50 to find some logical ways to hone in on that and to produce the information that needs to be produced. We have finally thrown up our hands with our vendor and we have hired a analytics consulting firm, BDO, Bard has. We have been 10:28:06 working extensively with them in the last two or three weeks and they have come up with a workable solution, we believe, to allow this to now be completed in a very expeditious manner. And so we have talked to Mr. Stoller. We are bringing these folks down -- in tomorrow. One of the BDO people is 10:28:27 recognized as one of the ESI gurus in the country, as I understand it. We're doing all we can.

As we indicated in the joint submission, our expectation is we're making every effort to get everything produced by the end of September, and a lot of it much sooner.

10:28:46 I would note, too, Your Honor, that for every single person that has been deposed, they have had that custodian's ESI prior to that deposition and we are -- shared drives have been the biggest obstacle. We're still working through the custodians, but we have a massive review team that's trying to 10:29:05 complete that right now.

Again, I share everybody's frustration. I want the Court to know that I and my client have been doing all we can to make this happen and we think that we have finally come upon somebody that's going to show us the way out of the 10:29:18 morass we've been in, given the amount of data involved.

10:29:22 THE COURT: What is this new vendor's name?

MR. NORTH: BDO. B as in boy, D as in dog, O as in Oliver.

THE COURT: And who's the guru?

10:29:35 MR. NORTH: What's his name?

I have not met him. I'm meeting him this afternoon for the first time and he's new to them. It's George --

MR. LERNER: George Socha, S-O-C-H-A.

THE COURT: Okay. I want to come back to this.

10:29:54 Let's talk for a minute about the other two areas of ESI.

Mr. Stoller, on the international front, what exactly is it that you're seeking? I couldn't understand from the report exactly the scope and the custodians and information that you're seeking on the international front.

10:30:14 MR. STOLLER: Let me give you a little bit of background. Recall when we were here months ago and started this process we talked about doing a phased approach to understanding how their information systems were organized, and one of the first things we did was, and I'll call it

10:30:29 informal interview, with Mr. Carr about how the Bard organizational structure is. What are their various divisions, what are the subsidiaries, what do those various companies do.

In the context of that interview, Mr. Carr, who was

10:30:48 the person they put up for the interview, identified a number

10:30:52 of companies whose function is to sell products internationally. And they sell IVC filters internationally. Those companies by and large, he said, use the same sales and marketing materials and the same IFUs. IFU's being
10:31:11 instructions for use, which are the instructions to the doctor in terms of using the product. The -- as are used in America.

To the extent those are the same, that's not what we're looking for. But he did identify some of them had different sales and marketing materials and different
10:31:26 instructions for use and different dealings with different regulatory agencies in those other countries. That's the information we're looking for.

What are they saying to other people outside of the United States that might be different from what they're
10:31:38 telling people inside the United States? Much like any statement to a third party about something that's at issue would be relevant here, we believe those outside the U.S. communications and information, particularly to the extent they're different than what's being told doctors and
10:31:54 regulators in the United States, are reasonably relevant for us to try to learn if they're saying things there that -- again, the issue here is safety and efficacy of these products and how they should be used. If they're saying different things to different people, we believe that is discoverable
10:32:11 information.

10:32:12 THE COURT: Why? Give me an example.

MR. STOLLER: So, for example, let's start with an early product. The recovery here to the instructions for use say, for example, that -- if I recall correctly. Don't hold 10:32:24 me to the precise numbers. They say, look, these devices, Doctor, are good for implantation in an inferior vena cava that is up to 28 centimeters wide.

One of the things that happens early with the recovery filter is that they tend to dislodge and they had for 10:32:43 a period of time, over 12 months, maybe nine deaths. Again, don't hold me quite to the numbers. But right after rollout they had a period of time where they had a significant number of deaths associated with the filter dislodging and traveling to the heart and killing the patient.

10:33:00 What they said internally at the time was, oh, you know what, we didn't realize this but a vena cava can expand and can expand well beyond 30 centimeters. When that happens -- I said centimeters. I mean millimeters. At any rate, when that happens it no longer holds in place and it 10:33:17 moves.

If they're giving different instructions for use, say in Japan or in Germany or wherever, and in the U.S. it says, hey, you can put them in 28 and in other places it says you've got to be smaller than that, say it says you have to be 24 or 10:33:34 26 because the expansion of vena cave may be such it can

dislodge and so you have to -- you can only use it in certain smaller ones. That is significant in terms of what they're selling in the U.S., telling doctors in the U.S. that it's safe to do it -- use it this way and someplace else telling them something different or more restrictive.

Does that -- am I making sense?

THE COURT: I understand what you're saying. How many of these international companies and how many countries are you talking about?

MR. STOLLER: I don't have the number in front of me, Your Honor. My recollection is they probably -- there are probably a dozen to two dozen of them. My recollection, though, in terms of at least the ones that Mr. Carr identified as having different IFUs and different literature because of whatever reasons, regulatory or otherwise, is more like five or six.

THE COURT: And how would you describe what you want from those companies?

MR. STOLLER: I would like their sales and marketing literature and their IFUs to the extent they're different from what's been provided to doctors and patients in the United States, and I would like their communications with regulatory officials in those other countries.

THE COURT: For what period of time?

MR. STOLLER: The relevant time period from when

these products came on the market, Your Honor, which is 2004.

THE COURT: What's the possible volume of this discovery?

MR. STOLLER: Your Honor, I have no idea.

THE COURT: Are you only asking for materials that are different or are you asking --

MR. STOLLER: Yeah, I don't --

THE COURT: You're asking them to decide what's different and just give you the things that they decide are different or do you want to look at it all so you can decide what's different?

MR. STOLLER: I think I have to -- well, I have to make decisions about what we're going to do and not do. I think if -- I don't know what the form or format of those, but if the information is the same, if they're identical -- I just want non-identical. I don't know how to answer that question other than -- because I don't know what I'm talking about. I'm working in a vacuum.

In theory, if the literature is the same, if they're identical sales pamphlets and those sorts of things, I don't need a different copy from England than I have, or Canada, than I have in the United States. On the other hand, if there are differences in those, then we'd like to see what the differences are.

But to answer your question, Your Honor, I don't know

10:35:52 the volume because I don't know what they have.

The conversation didn't get past go when I said we'd like the international stuff and they said we're not producing outside the U.S.

10:36:07 If you are amenable to us having those conversations because you believe like we do that these are discoverable, I'm happy to have those conversations with counsel about volume and get this moving.

THE COURT: Hold on just a minute.

10:36:21 MR. STOLLER: Sure.

THE COURT: When did you raise this issue with defense counsel?

MR. STOLLER: The outside the U.S.?

THE COURT: Yes.

10:36:42 MR. STOLLER: I don't recall the first time. I know that Mr. Lerner and I talked about it couple weeks ago when we were talking about the issues of dispute. We've got -- there's a fair amount of back and forth. I couldn't tell you when it first came up. It's been part of the conversation.

10:36:58 THE COURT: Was it raised before a couple of weeks ago?

MR. STOLLER: I'm almost positive, Your Honor. This has been a subject of conversation for quite some time because it's been part of the custodial conversation if no place else. 10:37:15 We talked about the custodians, boy, months ago. In

10:37:21 particular, we identified two of the custodians and they said we're not producing international materials. And my recollection is that conversation was more than two months ago.

10:37:36 THE COURT: And is that Siciliano and Dominguez?

MR. STOLLER: Yes, Your Honor.

THE COURT: Okay. Let me hear from defense counsel.

MR. NORTH: Your Honor, as a threshold matter I think it's important to note that there, to our knowledge, is not a

10:37:55 single international based plaintiff in the more than 7 or 800 plaintiffs who have now filed suit. There are certainly not any in the 46, soon to be 48, potential bellwether cases.

But Rob Carr's testimony, Your Honor, we believe, made it very clear why the information they're seeking is not

10:38:15 relevant for this particular litigation.

As he testified, these filters are designed here in the United States. In Tempe. They're manufactured in the United States at a plant in Glens Falls, New York. All of them. No matter where they're being sold. All marketing

10:38:34 materials are prepared in Tempe.

In fact, on page 57 of his deposition, Mr. Carr testified that international entities may not develop their own marketing materials.

All of the adverse event reporting, all of the

10:38:51 complaint investigation of adverse events is done in Tempe.

10:38:55 These are sales centers. The regulatory submissions are generally developed here in Tempe and sent to the international sales distribution centers or, as Mr. Carr called them, commercial sales structures, to deliver to the
10:39:13 local regulatory authority as necessary.

Your Honor, Mr. Stoller focused principally on the IFUs, instructions for use, and the ones used in other countries. I would respectfully point out that he has those.

The IFU from Bard is in, I don't know, 15, 20
10:39:35 different languages. When you get the entire IFU it's just a package. It starts with English, I think Spanish is second, and it goes on and on for the different versions.

If he has not located that, we'll certainly find that for him in the production. Or if for some reason it hasn't
10:39:51 been given to him in the materials he has, we'll get him a copy of that.

But those IFUs are developed here. And they're not -- there are not people in Shanghai or Brazil or Peru who are doing separate IFUs. They're getting the IFU from here
10:40:10 that's developed by the international regulatory people, and then they're using that with their products there.

These products are packaged and manufactured here, so the IFUs are all done here.

Your Honor, we believe that this is simply not
10:40:27 relevant to this case. He has the materials he would need to

see the IFUs. All the marketing materials are generated here. And we see no need to go to -- I don't have the exact number, but it's at least 15 to 20 sales commercial structures. I know there's one in Germany. I know there's one in Great Britain. I know there's one in the Netherlands, Spain, France. I've seen one in Brazil, Mexico, Japan, Shanghai, Singapore. The list goes on.

We're talking about an incredibly involved undertaking to try to go to all these different places and find some needle in a haystack when all of this material is prepared here in Tempe and then used by these folks as they sell the product in these other countries.

So for that reason, we're objecting to the attempt to expand discovery into the international realm.

THE COURT: All right.

Mr. Stoller, a brief comment on that, and then I'll ask you about Ring and Weiland.

MR. STOLLER: And, Your Honor, I think that Ring and Weiland is a non-issue. I think that's going to be part of their proposal to me tomorrow in terms of what they want to do there.

I think, my understanding was, the concern was how they're going to address the privilege issues with them. They only -- that only ended up in the joint report I think because when Matthew and I were talking on Friday of -- Thursday or

Friday of last week that they thought it might be an issue, so we flagged it there. But I think, based on conversations yesterday and today, I think that's not an issue we need you to touch on today.

THE COURT: Do you agree with that, Mr. North?

MR. NORTH: Yes, Your Honor.

THE COURT: Okay.

MR. STOLLER: Let me make two points and then I'll sit down.

The first is I don't know what we have in terms of those sort of things and whether we have all of the IFUs. I certainly know we've got different language IFUs, but I don't know and have not been told, and today's the first I've heard of it, that they think they've given us some or maybe all but they don't know. The conversation on this has been sort of a pound sand one. They're not -- they don't think the outside-the-U.S. information is relevant so they haven't -- they're not willing to produce it or discuss it. This is the first I've heard they think they've given us some, it hasn't been identified to me, and those relate to the foreign countries.

Secondly, the one thing you did not hear from Mr. North is about their regulatory communications there. Again, it's the same issue. What are they telling the regulators in those companies -- excuse me, in those other

countries about these very devices? We're not talking about different devices manufactured in different places. You heard it here from Mr. North, these are the very same devices that are manufactured here in the U.S., that are used here in the U.S., and they're communicating with regulators in -- I won't say third world countries, but in other countries about these very devices and their safety and efficacy, which is at issue in this lawsuit, Your Honor. These are statements by the defendants to a regulatory company about the safety and efficacy of these products. We believe we're entitled to access to them.

Would you like me to sit down?

THE COURT: Yes. Thanks.

Mr. North, what about the -- Mr. Lopez?

MR. LOPEZ: Yes, Your Honor. Can I add -- I'll come to the podium.

One of the issues with the foreign countries that are selling these, they all have a responsibility to prepare -- and every country is a little different -- adverse event reports. And you know that's a big issue in this case.

We are involved in another case where a company that was having foreign adverse events because they changed the product number were not reporting those foreign events to our U.S. FDA.

Our concern, we don't know whether that's happened

here or not, and maybe the only way for us to find out -- and they're required to report all adverse events whether they happen domestically or they happen in any other country if it relates to a product being sold here.

Mr. North just advised you the same product they sell here, they're selling in I don't know how many other countries. But if there are deaths or serious injuries being reported in those countries to those federal regulators that are not being reported here, that's a big issue for us. And if the only way for us to find that out is to conduct discovery on those foreign entities -- I don't know how they're set -- I don't know whether they're just a pass through to Tempe or some other Bard office here, but I think that each one of those countries requires that company to be -- that company that is a subsidiary of Bard to report to the foreign regulators adverse events.

I just -- if those exist in foreign subsidiary files and those aren't being reported to the FDA and not being given to us in a -- in their adverse event files or TrackWise database, I think that at the very least is something that I think we need to have and is relevant and we should have.

THE COURT: Thank you.

Counsel on the phone, we're picking up noise from office activities. Would all of you please make sure you mute the phone on your end because we're getting interference with

things you're doing in your office. Thank you.

Go ahead, Mr. North.

MR. NORTH: Thank you, Your Honor. As I indicated previously, all of the complaints are investigated and the reports are prepared here. And we have already produced to the plaintiffs the entire TrackWise database with all of the complaints, including dozens, if not hundreds, of foreign complaints.

With all due respect to the plaintiffs, if the attorneys would sit down and look at those complaints, they'll see the foreign complaints. And we don't believe that is a reason to launch this sort of massive international search they're now talking about.

Thank you, Your Honor.

THE COURT: What is your response on the question of when this was raised with you, because that's a concern you expressed in the report, that this is a late-breaking development in the case. That is, the international discovery. When do you think it was raised by plaintiffs?

MR. NORTH: Well, we had some preliminary discussions about it earlier and then we presented Mr. Carr for a deposition, and I think that was in May, perhaps. Late April or May. He was there to talk about the company's corporate structure and what these various entities did. And when he started testifying and explaining how everything is done in

Tempe, including marketing materials and adverse event reporting, all of that, we assumed that there was really no issue at that point. And then I believe Mr. Stoller's correct that it came back up a couple weeks ago.

THE COURT: What is your response to Mr. Stoller's point that there are communications, not adverse event reporting but communications, with foreign regulators that may be different than communications with the FDA?

MR. NORTH: I don't believe that really exists, Your Honor, except perfunctory enclosed please find the regulatory submission approval for such and such. Because if they'll go through the ESI they have and the materials we've produced for years, you're going to see many, many instances where a salesperson in Great Britain or Dublin will get some inquiry from the British regulatory authority. They immediately call the regulatory folks here in Tempe because they are the ones that generate the substantive responses. They're the ones that do the submissions for those regulatory agencies. So their U.S.-based discovery is going to sweep all of this up except the most perfunctory, as I understand it, types of communications.

THE COURT: Do you want to add a comment?

MR. LERNER: He beat me to it.

THE COURT: Okay.

Give me just a second, Counsel.

10:50:56 Mr. Stoller, a question for you. Do you have any basis to dispute the defendant's assertion that Mr. Carr testified that all marketing materials are prepared in Tempe; all regulatory communications, whether national or
10:51:15 international, are prepared in Tempe; IFUs are prepared in Tempe; products are developed and manufactured in the United States and not abroad? Do you disagree with any of that?

MR. STOLLER: Your Honor, as we had proposed to brief this and as I said, all I wound up getting prior to this was a
10:51:38 blanket "we're not producing that" rather than the explanation I've gotten here -- you've gotten here today.

I cannot off the top of my head recall the specifics of what Mr. Carr said in his deposition, so I can't tell you I have a specific recollection that he testified differently
10:51:52 than that. What I can tell you is that I have a general recollection that he said that there are different dealings -- different documents in the different countries. In some of them, not all of them. And that there were specifically differences in the materials because of, in some cases,
10:52:12 regulatory issues and dealing with regulators. If I recall correctly, he identified specifically Japan, if I recall correctly. But, Your Honor, in all candor I haven't reviewed that deposition in several months and I simply can't say one way or the other.

10:52:29 THE COURT: I think Mr. North's response would be

10:52:31 even if he said there may be unique regulatory requests in Japan, those would be answered out of Tempe, so you would get that in the discovery.

MR. STOLLER: I can't answer that one way or the 10:52:44 other except to say I'm not sure how many fluent people they have in Japanese here, or Danish, or German or those sort of things. I mean, I have -- let me say this. I have healthy scepticism that there isn't somebody who is being an interface in those countries, particularly since they have companies -- 10:53:01 they're not selling this stuff from America. They're not selling it from BPV America. These are separate, independent legal entities, and therefore there are people there working for those entities and interfacing through those entities with those other countries.

10:53:16 I can't answer the question as to whether -- what Mr. Carr said, but healthy scepticism and logic would say to me that's probably not the full story. And, again, I'm not -- while Mr. North has characterized this as a gargantuan task, we're asking for stuff that's different. If that is 10:53:35 gargantuan, seems to me that's a problem. On the other hand, I think it's probably more discrete. And we're asking for the discrete stuff. Whether produced here in Tempe or Japan or the Netherlands or wherever shouldn't really matter.

The dispute, to me, is not about who made it, it's 10:53:51 about do we get it. And, from my perspective, if they say,

look, you get it and you get all of it, whether it's produced out of Tempe or Japan is not the significant point here. I've been told, again, to pound sand on these issues.

THE COURT: Okay. Thank you.

All right. Talking about the international issue, I have my doubts this is relevant. Healthy scepticism, in my view, is not a basis to determine relevancy. And Bard did quote -- not quote, but describe Mr. Carr's testimony in the joint report, so I think plaintiffs were on notice that was going to be discussed today. But just to be sure I'm making a decision on the basis of complete information, what I'm going to do, Mr. Stoller, is ask that you provide me by the close of business on Thursday the 25th your information from the Carr deposition, or otherwise, that causes you to believe that the assertions of the defendants here today are wrong. Namely, that the relevant information is all created and generated in the United States and will be discovered.

I will look at that. If I think I need a response from the defense, then I'll get a text-only order out on Friday and give you till the close of business on Monday to file your response so we can decide this issue early next week. I do want to give you a chance to making that showing.

But I'll tell you now my view is that the possibility that Bard might not be reporting an adverse event in the U.S. that was reported in France, to me, is not grounds for

discovery in France. The mere possibility. Healthy scepticism isn't a basis for international discovery.

The standard under Rule 26(b)(1) is it has to be relevant to a claim. And so I think there needs to be a showing that there is reason to believe that discovery from these international entities would produce something different than what is being produced from the U.S. discovery. So if you could do that by the close of business Thursday.

MR. STOLLER: Certainly can do that, Your Honor. Let me ask a question, which is how could I possibly contest Mr. Carr's testimony without this discovery? I mean, it seems to me what they've said is we put up a witness and he said this, and we have no opportunity to challenge it.

THE COURT: You questioned him. Presumably you questioned him. I'm assuming he testified truthfully. I don't have a basis to think he didn't. And if he was deposed in May, there's been a couple months to work this issue.

So, to me, the notion that we're going to go to international discovery in a case where we've got no international plaintiffs on the possibility that there may be something said abroad that's inconsistent with something said locally and therefore will impeach the credibility of the witness, that's just getting very far afield from what the case is about. And so I think there needs to be some good reason to think that there's true value in that discovery

10:57:43 before I'm going to allow it.

MR. STOLLER: And I'm not disagreeing with you on that point, Your Honor. My question to you, I guess, is to the extent -- let's assume for a moment there are 10:57:52 communications between Bard and the foreign regulators in these foreign countries, which I think they would concede there are, that those things exist. I think my concern is it sounds like and Mr. North has articulated this as us asking for substantial volumes. I don't believe we are asking for 10:58:15 substantial volumes.

I think it's a fairly narrow request when we talk about what communications have you had with those foreign regulators about these particular products. It should not be a large volume of documents.

10:58:28 And to that extent, if those statements are inconsistent, just as the statements they've made with the FDA, if they're -- I don't -- apologize for stuttering over myself. But the core issue here is if they're making statements about the safety and efficacy of their product, 10:58:47 that seems to me to be corely relevant to the claims in this case. We're not asking for every communication with the world by those foreign entities, it's what are you telling the regulators about this? What are telling in your discrete sales and marketing that is any different from what you're 10:59:05 telling people in the U.S.?

10:59:06 Again, maybe I'm confused about the volume, but your question to me suggests you think it's a giant volume of documents out there. It seems to me that would be a very discrete volume of documents out there in the world and not 10:59:18 impose a substantial --

THE COURT: Well, what I'm relying on, on that point, Mr. Stoller, is Mr. North's assertion that there are 15 to 20 commercial sales organizations doing business around the world.

10:59:31 MR. STOLLER: And what I'm --

THE COURT: To go and get what those organizations have said to regulators in all those countries where they sell, to look at those communications and then decide is there anything in them that's inconsistent with everything we've 10:59:43 said to the FDA doesn't sound to me like a very narrow, discrete kind of discovery.

MR. STOLLER: What I'm relying on is Mr. Carr's testimony that most of those are consistent statements --

THE COURT: Somebody is still going to have to go 10:59:56 through the haystack to find the needles of inconsistent statement, which is what you're asking for. Maybe there's only four or five needles, but you can't say that is discrete discovery when you have to go through a haystack to find them. That's my concern.

11:00:09 So I have to have some reason to think that there

really is value in the discovery before I'm going to permit it. So I'll give you a chance to make that showing by the end of Thursday.

MR. STOLLER: All right. Thank you.

MR. NORTH: Your Honor, one thing. I want to be very candid with the Court. I was just looking through Mr. Carr's transcript as the Court was talking --

THE COURT: Mic, please.

MR. NORTH: Sorry.

He said exactly what I did say. He did add one caveat that I had forgotten about. Couple pages later he says that in those instances where another country's regulatory body approves a device for an indication where it can't be used for that indication here in the United States, that in that circumstance the local body may add to the IFU on that novel indication, but that all the information and data comes from Tempe still.

I just wanted to be sure I was clear on the record there.

THE COURT: Are you saying, Mr. North, that the indication would be one that isn't used in the United States and therefore wouldn't be relevant in any of the plaintiffs' cases?

MR. NORTH: That's my understanding, Your Honor.

THE COURT: All right. You're free to address that

as well, Mr. Stoller, in what you submit.

MR. STOLLER: We will, Your Honor. Thank you.

THE COURT: With respect to the shared space discovery, we've got to move this along, so this is what I want to do. I'll give you a chance to tell me if it's a bad idea. What I want to do is require the parties to reach agreement on this issue by a week from today, August 30th, on the basis of the meeting that will occur tomorrow, and presumably the plaintiffs need an opportunity to talk to their experts about what they hear from the defense experts. And if you don't have an agreement by August 30th, then we'll talk by phone and I will appoint a special master immediately with directions to meet with the parties and make a decision by September 16th. Two weeks.

So I'm going to have to find a special master who can dive right in, meet with the parties and their experts, and discuss what shared space discovery is appropriate. All so we can get this discovery done by the end of September, which is still only a month before the close of discovery.

That's the schedule I want to follow. So what I'm going to ask you to do is to -- well, actually, let me look at the calendar and pick an actual time.

I'd like to set 10:00 o'clock August 31st, a week from tomorrow, for telephone conference. If you reach agreement, just call my office and tell us you've reached

agreement and we can cancel that telephone conference. But if you are in disagreement on the discovery of the shared space, then we will talk at 10:00 o'clock on the 31st and I will designate a special master to dive in and get this thing resolved in the next few weeks. I see no other way to ensure we're going to get this done within the schedule we've set for the case.

Any comments on that or questions or concerns?

MR. STOLLER: No. Thank you, Your Honor.

MR. NORTH: Nothing, Your Honor.

THE COURT: Okay.

Okay, let's talk next about the mature cases. You indicated in your joint report that you don't think we should remand those cases until the expert discovery is done in this case because some of those cases, or all of them, may want to rely on the expert discovery here. That's reasonable.

You then ask the question what, if any, case-specific discovery should occur on those mature cases. My answer is none. That's not the purpose of the MDL. If it's truly case-specific discovery, that should happen after remand. So I don't think we ought to spend time in this case doing case-specific discovery.

Any questions or comments on that?

MR. LOPEZ: No, Your Honor.

THE COURT: Okay.

11:06:28 Let's talk about the class action schedule.

I could not fully understand from what you all submitted why an additional 70 days is needed for fact discovery. Could you explain that, please.

11:06:52 MR. NORTH: Your Honor, the reason we're requesting that is we're trying to conduct discovery of the representative plaintiffs that have been named to see if they adequately represent the proposed class, and all the criteria of a class action. Immediately following the last conference, 11:07:12 within a week, we made informal requests to the plaintiffs if they could expedite and get us medical authorizations because the medical condition of these plaintiffs will be important to see if they're representative of the proposed class.

We made that request on June 30th of 2016. We 11:07:31 repeated it on July 5th, July 7th. On July 20th we repeated it again. For the first time the plaintiffs said that they would try to obtain that information.

On July 26th they then came back to us, a month after we made the request, and said we have some concerns about 11:07:50 providing the authorizations. Even though they're the identical authorizations we had agreed upon for the bellwether plaintiffs.

Finally we got those authorizations, the first couple ones, on August 2nd, and we didn't get the last one until 11:08:06 August 15th. Last week.

11:08:09 Now, in the meantime, Your Honor, we have served basic discovery requests on the plaintiffs. We got the responses to those I think ten days ago or so. For the most part, on many different things there were just objections. 11:08:25 Many of the answers said things like, well, we will provide that information about the plaintiffs when we are briefing the class certification issue.

In other words, you can't have discovery on it was the basis of the objection, apparently. We'll show what you 11:08:41 our cards are once we start briefing.

We are in the meet and confer process on that and they have indicated some flexibility to help us and provide the information we think we're entitled to, so we're not ready to go to the Court on that as a discovery dispute. But, Your 11:08:59 Honor, we're just now being able to turn to the medical records vendor to start the process. And here we are at the end of August. And through no fault of the defense, we believe we, there's no way we can get the records and then take meaningful depositions of these 13 or so people by the 11:09:18 end of October.

We had some -- my team that's working on the class action had some lengthy discussions with the plaintiffs' attorneys last week and I think in recognition of the fact they had, probably inadvertently, delayed that process they 11:09:34 agreed to that proposal.

11:09:36 We were seeking a 60 days extension and everybody realized 60 days was going to put us somewhere between Christmas and New Year's, which is why it went to 70, as I understand it.

11:09:48 And I understand the Court's desire that the discovery schedules stick. We've done everything we can, knowing there was a short time fuse, to get this discovery going, and we just got the authorizations we need to get that started, many of them, just last week or in the last ten days.

11:10:08 So for that reason we would request the Court enter the revised schedule.

THE COURT: Plaintiffs counsel.

MR. SELTZ: Good morning, Your Honor. Daniel Seltz from Lieff Cabraser Heimann & Bernstein. I'm going to address

11:10:28 the schedule on behalf of the class plaintiffs.

I would take issue with Mr. North's characterization of the sequence of events. But where we have arrived is that the plaintiffs have every interest and we share the defendant's interest in moving the case forward as quickly as

11:10:45 possible.

We did get a request for -- informal request for these medical authorizations in early July. There are 11 plaintiffs who are scattered around the country. They have different relationships with different of the firms and we

11:11:03 moved forward as quickly as we could once we agreed to provide

these. The first of these we got to Bard in early August. They now have all of them.

Mr. North mentioned we had raised some concerns about providing them, but once we decided to get these authorizations to Bard, we moved forward as quickly as we could. That process never slowed. So we've -- the -- they have all the authorizations, which were an informal request.

In terms of the formal discovery, we responded, I think it was August 15th, to two sets of interrogatories, several dozen document requests, several dozen requests for admission. Many of them, as Your Honor might expect, we had questions about. Many of them were, in our view, overbroad. And so we served the combination of responses and objections. And I believe it was the next day when we heard that as a result of these objections, Bard wanted to move right away to extending the discovery schedule.

We initiated a meet and confer that happened the next day. It was a lengthy meet and confer. I believe that aside from one or two discrete issues, we either have agreement or we'll be continuing to discuss these -- some of these topics over the next couple of weeks.

None of these discussions I think are ripe for Your Honor's attention, but because Mr. North raised it I just wanted to quickly mention that, you know, some of the requests that he mentioned concerning class certification were -- they

were phrased in terms of show us -- put forward your theory of class certification, give us all facts that go to each element of Rule 23. And, you know, that's something that courts in this circuit have held is premature. It's not a proper use of Rule 33.

So we had discussions about that and I think, you know, we've been able to come to an agreement about how we're going to approach that.

But all that is to say that we share the defendant's interest in moving forward and we're now in a position to do so.

The schedule that we've agreed to, it sort of keeps the class case roughly in line with the progress of the MDL. I think we also have an interest in not getting behind and not getting ahead because there's going to be some overlap in proof and so we want to realize efficiencies where possible. Although this schedule extends the dates out by 60 or 70 days, it keeps -- it keeps the cases moving along the same place along the tracks.

THE COURT: What is the number of named plaintiffs?

MR. SELTZ: There are 11 named plaintiffs.

THE COURT: What experts, Mr. Seltz, do you think plaintiffs are likely to use in connection with class certification?

MR. SELTZ: Well, we're still working with at least a

11:15:07 couple of different experts, but it's certainly one or two of the experts will opine as to the -- as to the notice -- as to the monitoring program that we've alleged is necessary in this -- in this case.

11:15:25 THE COURT: How many experts are you thinking you're going to need?

MR. SELTZ: I'm just not in a position to say whether it's going to be two -- I don't think it's going to be more than four. But I don't -- it may well be one or two. It's

11:15:44 just -- I'm not -- I'm not in a position to say today.

THE COURT: Does -- does the complaint seek relief other than medical monitoring?

MR. SELTZ: It also calls for a notice program to go out to doctors and patients.

11:16:00 THE COURT: In support of medical monitoring, I presume?

MR. SELTZ: Yes. But essentially what the complaint seeks is injunctive relief in the form of this medical monitoring program. So I should add, Your Honor, in the

11:16:19 interests of trying to compress these dates, we had proposed initially that the plaintiffs make their disclosures of their expert reports in connection with their opening brief on class certification and there would be a period of perhaps 60 days for Bard to both respond to that, to the opening brief, and to

11:16:46 also depose our experts. They would then disclose their

rebuttal experts in connection with their opposition to class certification.

Bard didn't want to proceed that way so we have -- we're doing it the way that these cases also often go, which is to have a period of expert discovery leading up to class cert briefing.

THE COURT: Okay. Thanks.

Mr. North, or whoever on the defense --

MR. NORTH: I don't think I have anything to add unless the Court has questions.

THE COURT: What experts do you think are going to be needed?

MR. NORTH: Well, I was at this point tentatively thinking of two. But if they're going to have as many as four, I may need to rethink that. I'm not sure what disciplines they would be in. But we would probably have certainly an interventional radiologist and maybe a cardiologist.

THE COURT: To talk about what? Generally. I'm just trying to get a sense for how significant the expert discovery in this case is going to be.

MR. NORTH: To talk about what we perceive as there's no consistency, first of all, in what sort of medical treatment needs to be given to individual patients, making it inappropriate for class treatment.

THE COURT: You mean medical monitoring? You said medical treatment.

MR. NORTH: Right. I'm sorry. For medical monitoring. There are -- would not be consistency among the class members and so we'll have experts to talk about that. We'll have experts to talk about whether there is a need for medical monitoring in the first instance and issues of that sort.

THE COURT: Well, I've assumed, without diving into this case deeply at all, that the issue with class certification will be whether individual issues will predominate or not. I'm assuming that's -- is this a (b)(3) class, Mr. Seltz?

MR. SELTZ: It's a (b)(2) and (b)(3) class and we've also alleged it could also take the shape of a (c)(4) class in which the court certifies particular issues for class treatment.

THE COURT: Am I right, though, that the primary battleground is likely to be whether individual issues predominate, whether it's suitable for class treatment or whether it will devolve into a series of individual trials?

MR. NORTH: Yes.

THE COURT: Is that likely to be the primary battleground?

MR. SELTZ: That is often the battleground in these

cases. This case is like others in that way.

THE COURT: Okay. Give me just a minute.

Okay, let me give you the schedule I'd like us to follow. I'm shortening up the class discovery and class certification -- I'm sorry, the expert discovery and the class certification schedule some because I don't think we need to stretch it out as far as you have.

I will adopt your proposal that we allow fact discovery in the class case until January 9th of 2017, as well as your proposal that plaintiffs' experts be disclosed on January 13th.

I'm going to require defense experts by February 24th.

Any rebuttal experts from plaintiffs by March 24th.

Expert depositions to be completed by April 28th. So there will be a little over a month for the class experts to be deposed.

The motion for class certification by May 12th.

The response by June 9th.

The reply by June 30th.

With a class certification hearing to be held on July 14th at 2:30 p.m.

I think that is a reasonable amount of time to get it briefed and get discovery finished. And that will get us to class certification in July, whereas under your schedule we

wouldn't finish the briefing until August and I don't want to drag it out that long. We're going to be picking bellwethers in the spring. I'd like this case to be moving along at a reasonable pace about the same time.

And since class certification is an important milestone in this case and in the overall settlement picture that undoubtedly will be on parties' minds as we're getting bellwethers teed up, I think we need to accelerate it a little faster. So that is the schedule we will adopt.

Let's talk about the Beasley deposition. Is that still at issue?

MR. BOATMAN: It is, Your Honor.

THE COURT: Let me tell you what I want to do on this. I think Mr. Beasley does constitute an apex deponent as the cases have described apex depositions.

As you know, the general factors that are considered in deciding whether an apex deposition should be permitted is whether the executive has unique first-hand non-repetitive knowledge of the facts at issue in the case and whether the party seeking to depose that executive has exhausted other less intrusive discovery methods.

That is language, actually, that I'm quoting from a couple of cases, but it's summarized in a case called *Klungvedt*, K-L-U-N-G-V-E-D-T, *versus Unum Group*, which is 213 Westlaw 551473. It's a decision from this court from 2013.

11:28:52 So I think the burden is on plaintiffs to show those two things. Namely that Mr. Beasley possesses unique firsthand non-repetitive knowledge of the facts at issue in the case, and, secondly, that you have exhausted other 11:29:08 less-intrusive discovery methods to obtain the information that he might possess.

So does somebody from plaintiffs' side want to address those two factors?

Mr. Boatman.

11:29:21 MR. BOATMAN: Your Honor, the way this was set up was that we had -- we weren't sure that the Court was going to adopt the apex approach and requirements, so the point today to was try to determine, I think, if the Court was going to require that and, if it was, our proposal was we would submit 11:29:47 a brief on the factual issues the Court wanted briefed by Friday and have it heard next week.

THE COURT: I know that was the proposal. I'd prefer to decide it today. Are you just not ready to address it?

MR. BOATMAN: We're not ready to address it today, 11:30:01 Your Honor.

THE COURT: All right. Then let's have the parties submit simultaneous three-page briefs. It doesn't need to be long because you don't need to address the law. I think the law is pretty clear in this area.

11:30:19 Really the question is what does Mr. Beasley have

that's unique that you can't get elsewhere? And have you exhausted efforts to get it? That's the test I've seen applied in every apex deposition issue I've had to address, and that's what I want the parties to address. So I think they can be simultaneous since you know exactly what the target is you're shooting at.

Why don't you get three-page memoranda filed by the close of business Friday and I'll get you a decision early next week.

MR. BOATMAN: Thank you, Your Honor.

THE COURT: Okay.

All right. I want to address now the plaintiffs' objections that have been identified in the report as creating issues between the parties. I don't want to brief this if we can avoid it. It seems to me these are fairly straightforward issues. I would like to talk through the three areas and then we'll talk about defendant's objections.

The first category, as I understand it, is defendants have sought to discover plaintiffs' communications with the FDA from January 1st of 2013 to the present. My understanding is the reason defendants want it is because it relates to the FDA warning letter that is at issue in the case and the defendants want to know what input plaintiffs provided on that subject.

MR. NORTH: Yes, Your Honor.

11:32:11 THE COURT: So I think I want to start with plaintiffs addressing why that's not relevant. Why is it that I should say discovery on that subject should be foreclosed?

MR. LOPEZ: Well first of all, Your Honor, if you 11:32:35 look at the discovery, I mean it's clearly case-specific discovery, so let's start with that. In other words, are all 850 plaintiffs going to be subjected to this discovery? So I think the first decision that has to be made is is this case-specific discovery?

11:32:52 I -- I'm not really prepared today to address the merits of these. I mean, we can talk about them, but this is something that we'd like to brief. And our position -- we have a very strong position on relevance. What's the relevance of whether or not a plaintiff somehow prompted FDA 11:33:13 to conduct a 15-month investigation?

Now, if the question is did a plaintiff aid in that investigation, there may be a different issue. But that -- once you open up the FDA process, you're opening up a process that -- no one can really do any discovery. We cannot take 11:33:31 the deposition of anyone at FDA. I mean, it's just off limits. You can't take depositions of FDA officials. Best you can do is get documents about that. And even that, those are protected.

So our position on that, number one, is this is 11:33:48 case-specific discovery.

11:33:49 And number two, what is defense going to argue in defense of their case? How is that going to even come into evidence that some plaintiff may have contacted an official at FDA that prompted a full-scale investigation? I mean, that's 11:34:06 not something we're going to put into evidence.

What is that -- are they casting doubt on the credibility of the -- of that investigation and the findings? I mean, if they are, how does a contact by a plaintiff contacting FDA and telling FDA, hey, by the way, I think you 11:34:27 ought to investigate Bard because of the following -- and FDA engages on that full-scale investigation and they come up with their findings that we've litigated here, that we've talked about, and that's been the subject of many depositions. I mean, I'm -- I just -- I'm just at a loss to, you know, find 11:34:48 out why this is something that they would even want to bring up at trial in defense of their case.

It's not something -- certainly we're going to use the warning letter, but we're not going to champion into the courtroom and say look what we did, we woke the FDA up to an 11:35:03 issue they should have been woken up to ten years ago. We're not going to do that. You wouldn't allow us to do that.

So let's start with that. There's just a significant issue here of relevance. We want to be able to brief that.

So do you want me to address any other issues?

11:35:20 THE COURT: Not yet.

11:35:23 Mr. North.

MR. NORTH: Your Honor, as Mr. Lopez indicated, and as we all know, the plaintiffs intend to affirmatively use the FDA warning letter, to the extent they can establish 11:35:38 admissibility, against the defendants. And in turn we believe that we are -- should be entitled to discovery about sources of potential bias or motivation leading to the FDA investigation in the first instance.

And in fact, Your Honor, there are a number of cases 11:35:56 that have addressed this situation. And one case called it the, quote, well-traveled route, close quote, of persuading government entities to take action against a party for the purposes of gaining a tactical advantage in litigation. And in that case, which is 1993 Westlaw 277182, the court allowed 11:36:20 discovery about contacts that one of the parties and/or their attorneys had had with a government agency that then conducted an investigation.

Another case is *Reed versus Advocate Health Care,* at 2007 Westlaw 2225901.

11:36:40 And we believe that we're entitled to see if the plaintiffs -- particularly, let's be honest, their attorneys -- and I think under *Hickman versus Taylor* it's clear that the scope of discovery includes information held not only by the party but by their attorneys. I think we're 11:36:58 entitled to see if the plaintiffs had some sort of instigating

role in the FDA investigation, and whether that then demonstrates or undermines their use of that particular investigation and the warning letter at trial.

THE COURT: From all 800-plus plaintiffs in the case?

MR. NORTH: Your Honor, I admit that is an unwieldy proposition. What we would suggest as a compromise is either the 48 plaintiffs that have been named as the potential bellwethers or on behalf of the attorneys that make up the plaintiffs' steering committee.

THE COURT: Let's assume we're starting trial this morning, Mr. North, in the bellwether case of Mrs. Jones, and you've got no evidence that Mrs. Jones or her attorney had any communications with the FDA. What are you going to say in your opening statement, that you think I will allow, about attorney X's contact with the FDA two years before on behalf of another client?

MR. NORTH: Would say, Your Honor, the plaintiffs place great stock before this jury on the warning letter and what it is supposed to indicate concerning my client's alleged failures, and what the plaintiffs don't tell you is the fact that one of their fellow colleagues in the plaintiff's bar went to the FDA in the first instance and gave the FDA documents and tried to inspire that particular investigation in the first instance. And this is an FDA that has inspected my client's complaint files repeatedly, as they do, over the

years, and the same files that they have lauded the company in the past as being exemplary of complaint tracking and adverse event reporting, this time, having gotten this, quote, tip, unquote, from the plaintiffs' attorney or a plaintiff's attorney, they then had a different result.

And at the same time, they're under pressure, the FDA, to do something because NBC News, who the plaintiffs also went to, had published or broadcast reports about this product, with many untrue claims. And in those reports, they have said repeatedly, NBC, they've contacted the FDA to no avail and with no comment, and we believe we can show this is part of a scheme for the plaintiffs' attorneys to manufacture evidence to put political pressure on the FDA to try to crucify this product when otherwise it would not have been.

THE COURT: Okay.

MR. NORTH: Thank you.

THE COURT: Mr. Lopez.

MR. LOPEZ: Your Honor, if there was -- I mean, this was a 15, 16, 17 -- I'm not even sure that investigation is over. If there was one exchange between FDA and Bard that would any way call into question the credibility of this investigation by FDA, the exchange of information that Bard gave FDA, the challenges that Bard had -- part of this investigation was Bard having to go back in their own files and they found that 30 percent of their adverse events for

severe injuries were not reported properly to FDA and another 10 percent were not reported at all. And they used those adverse events in their marketing and in establishing -- in touting the safety and efficacy of their product.

If Mr. North showed up with a document, these thousands and thousands of documents of exchanges that show that somehow or other the FDA was influenced outside of their own unique motivation to do what they did, then maybe, maybe there's something relevant about that. But how the FDA got jump started to do an investigation has no relevance in this case.

FDA -- like I said, if they there's some kind of evidence this was an unfair investigation or that it was somehow being influenced by a party in the case, then maybe there's something to talk about, but this is just -- it's like Mr. Boatman gave me an analogy of someone reporting a crime next door and you find out the crime actually occurred and somehow or other the person that reported the crime gets castigated and there's some relevance to the fact that he had a vendetta against the next door neighbor.

I mean, the reality is that whatever the motivation may have been by the reporting of it, what happened was what was reported was, in fact, true.

So I'm not saying that to suggest to you there was any influence by anybody, whether a plaintiff or plaintiffs'

lawyer or anyone in the PLC that caused this warning letter to be instigated. I'm just telling you I'm protecting right now the relevance of that. The fact is that it's not relevant, it is not probative of anything in any part of this case whatsoever.

And we'll get to the point of whether or not that actually happened, but, again, this is case specific -- these are case-specific issues. Unless counsel can show there's some kind of relevant information that can be gained by finding out who may have been the champion that caused FDA to find out a lot of bad stuff about this company, I just think it's off limits for discovery. And we'd like to brief that if the Court is -- thinks there's a dispute here that -- if you're leaning towards making us do that, so we'd like to brief it.

THE COURT: Okay. For the benefit of the court reporter, we need to take a ten-minute break. I'm going to just push into the noon hour so we can get this hearing done. So let's plan to resume at five minutes to the hour and we'll continue this discussion.

(Recess taken from 11:43 to 11:55.)

THE COURT: Thank you. Please be seated.

Let's talk about discovery of plaintiffs' communications with NBC.

The question I have for plaintiffs counsel -- there's

really two of them. One is do you agree with the defendant's assertion that plaintiffs' attorneys in various depositions have been asking witnesses questions about portions of the NBC reports? And, secondly, do the plaintiffs intend to use the NBC reports at trial in any way?

MR. LOPEZ: The answer to the first question, Your Honor, yes, portions of it. I used a portion myself. There was a Dr. Kuo, who is a former key opinion leader, who was brought up during the deposition and I showed his interview to the witness and I asked questions following that.

We have no intention of using that NBC news story. First of all, even if we did I doubt whether it will pass any evidentiary requirements that you or any other judge might have.

Now, having said that, there's always the idea of impeachment issues that might come up.

But, again, we don't intend to make -- to show any interview part of our case in chief. I don't know how that gets into evidence. We've taken the depositions of the individual, Kay Fuller, as you know from prior hearings we've had. The plaintiffs -- one of the plaintiffs that was interviewed was a plaintiff who was brought up today earlier. I mean, she could be deposed.

So a very long answer to a short -- to a question that requires a short answer, but we have no intentions of

using those NBC news pieces in our case in chief.

THE COURT: All right. What else do you want to say on this issue about discoverability?

MR. LOPEZ: Only thing, number one, we said in our brief we think it's a case-specific issue, and, number two, there's just no probative value unless those pieces somehow become part of our proof or if the defense intends to use that in defending the case. We don't see any relevance.

The motivation for finding that out is something other than finding probative, usable, admissible evidence in the case. And, again, it's something we'd want to brief, Your Honor, if Your Honor can't deal with it today.

THE COURT: Okay. Thank you.

Defense counsel.

MR. NORTH: Your Honor, first of all, as Mr. Lopez recognized, they have been affirmatively using the NBC broadcast in challenging at least one of our company witnesses with it. Secondly, while he says they do not intend to use it in their case in chief, he does not foreclose the possibility that they will use it for impeachment or rebuttal.

But more important, Your Honor, we believe if there is bias and if plaintiffs' attorneys help to instigate the NBC broadcast, which we're fairly certain they did since NBC had confidential documents of the company, then we think we're entitled to know that for a number of reasons.

11:59:25 For example, Kay Fuller. Kay Fuller appeared on NBC, made some statements, which the reporter then took well beyond what Ms. Fuller had even said, to make allegations against the company. We have deposed Ms. Fuller, and I believe that a 11:59:44 fair reading of her deposition will convince most jurors that what she's telling is not the truth. And I think that we ought to be able to show and undermine a lot of the evidence the plaintiffs are going to rely on by noting that in essence they have helped to manufacture some of this evidence. And I 12:00:05 think it goes to the bias underlying that evidence.

But most important, given the fact they're affirmatively using this as evidence, despite any representations they may -- they don't intend now to use it in their case in chief at trial, I think we're entitled to show 12:00:25 the connection and discover the connection under -- behind the plaintiffs' attorneys, we believe, going to NBC and starting this investigation in the first instance. And it's also tied in to the FDA investigation because of the way that the FDA did this investigation, the way -- the timing of it, and the 12:00:49 fact that, Your Honor, one of our employees told us that when the investigator showed up in Tempe, he -- or she, I think, said that they got a tip from someone and that's what prompted the investigation.

But all this is tied up together in timing and in 12:01:09 scheme, and a lot of this they may try to bring this out when

the case goes to trial, and we believe we ought to be able to fully discover this. And it's not very onerous what we're asking for. We're just asking whether the plaintiffs' attorneys, principally, have had contact with NBC and copies of their communications. And so we would ask the Court require them to produce that.

THE COURT: And, again, you want that for all 800-plus cases?

MR. NORTH: In a perfect world, of course. I do recognize that is unwieldy. We would, as a compromise, suggest for the 48 plaintiffs who are part of the potential bellwether pool. Or, alternatively, for the attorneys that that are on the plaintiffs' steering committee.

THE COURT: Okay.

While you're at the lectern, Mr. North, what is the relevancy of third-party financing, if any exists in the case?

MR. NORTH: Your Honor, I think it could be relevant in the case in a number of ways, and I will be honest with the Court, I think of the three issues that are subject to this general discussion, this is probably the one that is the most case specific, in my view.

But litigation funding can go to several issues. First of all, it can go to the real party in interest. I believe that, depending on the structure of litigation funding, whether it's a hedge fund or some other private

group, the jury may need to be qualified as to any relationship. It may go to the real party in interest type issues.

Secondly, Your Honor, as the courts are discovering in the --

THE COURT: Before you go on, when you say the jury may need to be qualified, that would be only true if the jury was going to know that there's a third party funding source; right?

MR. NORTH: Your Honor, I've always been under the impression that the jury needed to be qualified for any relationship with someone who had a financial stake in the verdict.

THE COURT: What if they don't know that somebody has a financial stake? It can't influence their verdict; right?

MR. NORTH: Well, as a defense lawyer, Your Honor, I have often thought that ought to be the case when insurance companies -- juries are often qualified as to insurance companies, and that's the first instance they will hear the involvement.

THE COURT: In 13 years I've never had a lawyer in a trial ask me to qualify the jury on the basis of an insurance company that's involved. Because insurance companies aren't mentioned during trial so the jurors don't -- it can't influence the juror.

12:03:55 MR. NORTH: I wish you would write a treatise about that in Georgia courts because that is a common practice there, Your Honor.

THE COURT: Okay. I interrupted you. You were going 12:04:03 to go on and say other things.

MR. NORTH: In some cases I also believe litigation funding can go to damages. Evidence has been uncovered in the pelvic mesh litigation that some litigation funding groups are pressuring plaintiffs to have unnecessary surgery, there have 12:04:21 been several, to boost the damages. And then they take a cut of the amount of damages. Very unseemly relationships.

I don't have any evidence that's occurring here, but it is very disturbing because it does appear to be occurring in the pelvic mesh litigation where litigation funding -- some 12:04:45 groups are actually getting involved in the medical care of the patients. Judge Cheryl Eifert up at the Southern District of West Virginia has handled a couple of motions to compel filed by various manufacturers and has granted them and made a number of comments about how disturbing this is. It's going 12:05:04 on out there. You can see there's some discussions of this in the legal press.

And I believe in an individual case it could go very much to damages as to why did the person get the surgery in the first place? If it's not necessary, were they influenced 12:05:23 by a litigation funding company? Because as hard as it is to

accept, we believe that's happening and there's increasing evidence it is.

Again, I have no evidence it is here. But it's going on in other mass tort circumstances in this country. That seems to be certain. And we believe we have the right to determine that here to make sure that the damages claims are medically indicated.

THE COURT: All right.

Plaintiffs counsel.

MR. LOPEZ: Should I address the NBC issue as well, Your Honor, or are we done with that?

THE COURT: I thought we were done. If you had other points, I'm happy --

MR. LOPEZ: No, I -- again, I think the use of that, that will be case -- well, I think the main point there, there's nothing that happened in those stories that has not been part of a full-scale discovery deposition.

In other words, anything that may have been on those NBC stories, there's been deposition after deposition and the one thing I took issue with is he called these confidential documents. What I saw on that story were all public documents. So the source of that is independent. All of those documents that were shown have been the source of cross-examination, direct examination, experts on both sides using those. There's just no reason to have a media story or

12:06:54 the source of that be part of this case.

THE COURT: Well, here's the issue in my mind, Mr. Lopez. If there is the possibility that the NBC story is going to be mentioned at trial, even as impeachment evidence, 12:07:08 it seems to me that there is a reason that the defendants would want to be able to explain to the jury how the story came about. And my concern is I understand you've said that you have no intention of affirmatively introducing it --

MR. LOPEZ: Right.

12:07:28 THE COURT: -- in the bellwether cases. You have reserved the possibility of impeachment. But we have 850 or more cases here which, theoretically, will go back to their home districts. And I'm assuming you're not speaking for all lawyers in saying they won't try to use the NBC story.

12:07:48 And the question will be if I addressed it and denied the discovery in the MDL, I'm sure in those home districts the argument in those courts will be this was addressed in the MDL and discovery was denied and we get to go to trial without the defendants getting that discovery and we do want to use the 12:08:07 NBC story. What's your thought on that?

MR. LOPEZ: My thought on that -- it is a case-specific issue. I think we're not there.

I would say this about the NBC story. You're right, I can't speak for every lawyer in America, but I think every 12:08:21 lawyer in America has a right to say we have no -- we are not

12:08:24 going to use the NBC story in our case, and if there's a part of it that we want to use, for example if we're deposing Dr. Kuo and Dr. Kuo says something contrary to what he said on TV and someone wants to show that little finite piece to 12:08:39 either refresh his recollection or to impeach him, I don't see any problem -- I don't see why that's a problem. And whether or not he -- how he got there is not -- he has the right to explain it. They can ask Dr. Kuo how it was he got on TV and said what he said. That is something that can be addressed at 12:08:57 a deposition of Dr. Kuo.

Now, right now, I mean, there's no basis or purpose or intention on at least my part on behalf of my clients to introduce any part of the NBC story. I'm very happy with the discovery we've conducted with respect to all of those issues.

12:09:17 Now, I assume that some of the plaintiffs that were shown on that, if they're probably going to -- Mr. North already said we're going to impeach Dodi Froelich with what she said on TV. So there's stuff like that, Judge, where it becomes evidentiary. I mean, it's a true evidentiary issue. 12:09:34 But how the story developed and how it was reported, who got an opportunity to be heard, there's -- that's not going to be something that's going to be in front of a jury.

So I would say that every case needs to be challenged and every plaintiff and every plaintiff's lawyer has to be 12:09:53 challenged: Do you intend to use any part of the NBC story?

If my answer is yes I intend to potentially use it, if Dr. Kuo gets deposed and he says something differently or I need it to use for his recollection, that's evidence. And then if that's the case, then maybe you have a right -- they have a right to know how it was Dr. Kuo -- I still don't think it's relevant as to whether or not Dr. Kuo got prompted to go to NBC by some lawyer or some plaintiff. He can be asked that at his deposition. So it is a case-specific issue.

You're right, I can't speak for every lawyer in America. But I can speak -- but then again, it doesn't mean you open up this whole thing if 95 percent of us have no intention of using that story or making it relevant.

THE COURT: Why don't you address third-party financing.

MR. LOPEZ: Here's the thing with third -- I still haven't heard -- first of all, I take issue with the fact that in some other case there's pressure being put on by somebody in another case to another plaintiff's lawyer to another plaintiff. That's not happening here. I don't -- I actually took offense to hearing him say that to influence you that somehow or other the funding -- there's no evidence of that.

If Mr. North had evidence that I just took the deposition of a plaintiff and the plaintiff said, "I really didn't want to have my device removed by Dr. Kuo in Stanford with a $25,000 procedure except for the fact some third-party

12:11:25 funder was paying for that" -- there's none of that. That's, again, another case-specific issue.

To try to taint all of us by one or two things that may have happened against his client or some other client in 12:11:37 another case is unfair and I take issue with the fact that there was even an implication that any of that was going on here. I can assure you it's not going on here. So that's number one.

Number two is this idea about a third party in 12:11:52 interest, how is that going to come up in trial? Unless there's some evidence that that third party is somehow influencing evidence, influencing what's being admitted, influencing a witness. There's no evidence of that.

The other thing that Mr. North references, that 12:12:11 somehow or other has something to do with motivation to settle. That there's pressure because of some third party that may have -- I mean, just think for the moment if we were bringing this motion and we said, you know, we want to know every penny that Mr. North's firm has made in defending Bard 12:12:29 for the next ten years and particularly over the last year or two, because we suspect that what's keeping them from settling the case is the millions of dollars that the defense firm is making and want to find that out. That's what he's asking of us.

12:12:45 He's asking whether or not there's financial

incentive by someone outside of the plaintiff and the plaintiffs' lawyers, and there is no evidence of that. That somehow it's having an effect on us settling the cases. First of all, there's been no overture of settlement. But I've got to address it because it was in his brief. He's suggesting somehow or another -- that's keeping the plaintiffs away from the settlement or mediation table. It's not. Or somehow or another it's going to influence whether or not these cases settle for X amount versus another amount. It won't.

So for him to even suggest that that somehow or other is going to influence me or any of my colleagues that are working on this case, again, is another thing I take issue with. There's no evidence of it. If he has evidence of it he can put it in front of the Court.

So, again, case-specific issue, no probative value, and if the Court would like, we would appreciate briefing this issue because it's important and we vehemently oppose having to give that up.

Thank you, Your Honor.

THE COURT: Okay. Hold on just a minute, Mr. Lopez.

Let's talk about the next category, which is you made request for -- maybe there's somebody else on your side to address this, but it's the request for production plaintiffs made with respect to the marketing 30(b)(6) deposition and the REACH, R-E-A-C-H all in caps, program. And the allegation in

the report was no documents have been produced. The defendant's response was yes, documents have been produced and plaintiffs raise this issue for the first time on August 16th.

MR. LOPEZ: That's Mr. Stoller. I can address the multi-plaintiff issue, Your Honor.

THE COURT: We'll come back to that.

Mr. Stoller.

MR. STOLLER: Your Honor, I believe this issue has been resolved between the filing of that joint report and today. I confirmed again this morning with Mr. North and Mr. Lerner that they subsequently have produced to us what they contend is all of the REACH documents and they're producing this week the sales and marketing documents.

THE COURT: You agree, Mr. North?

MR. NORTH: Yes, Your Honor.

THE COURT: Okay. Let's talk about the multi-plaintiff cases.

What you indicate in the joint report is that a multi-plaintiff case was recently transferred to this court. You cited Oma Hardwick, O-M-A Hardwick, as the plaintiff and gave me the case number as 16-1953, but when I went to the docket, that's a short-form complaint filed by single plaintiff as it came up on CM/ECF.

MR. NORTH: Your Honor, that was our mistake. Ms. Hardwick was actually one of the people who had duplicate

12:15:23 complaints, and I guess we put the number in for the duplicate as opposed to the multi-plaintiff. I will get that correct number for you.

THE COURT: There was no motion to dismiss pending in 16-1953.

12:15:34 And you've indicated that there's another 40-plaintiff case coming our way, potentially, after the MDL panel meets in September.

So I guess the questions I have are the following: 12:15:55 And actually, Mr. Lopez, I think Mr. North was the one I want to ask these questions of initially.

What is -- what is, Mr. North, the nature of the motion to dismiss you are filing or have filed in these multi-plaintiff cases? What's the --

12:16:15 MR. NORTH: Your Honor, it's based on the absence of personal jurisdiction under the Supreme Court -- U.S. Supreme Court's 2014 decision in *Daimler versus Bauman*, B-A-U-M-A-N, I believe it is, where the court sort of further defined personal jurisdiction over a manufacturer when a out-of-state 12:16:36 plaintiff is using that state's federal or state courts to try to sue someone. They've ruled -- the courts ruled, as I understand it, there are limitations on, let's say, what a Missouri court, state or federal, can do as far as exercising jurisdiction over a company like Bard even though it may sell 12:17:00 products in that jurisdiction if its conduct in that

jurisdiction is not related to the injuries to that particular plaintiff.

And, for example, in the Oma Hardwick case, which I think we have to rename because she yesterday dismissed herself from just that multi-plaintiff case, but there's still six or seven other plaintiffs there. Not a single one of them is a resident of Missouri and therefore that case being filed in Missouri, we believe, under the *Bauman* decision is improper. There are a number of other courts throughout the country now that have reached rulings to that effect. There's a growing body of precedent that would support that argument. And that's the reason for the motion to dismiss.

THE COURT: The argument as I understand it from the description just given me would be a plaintiff who lives in Florida can't sue Bard in Missouri if nothing related to the plaintiff's surgery or injury occurred in Missouri.

MR. NORTH: Yes.

THE COURT: And if the case was dismissed, that plaintiff could immediately refile the case in Florida, and then it would get transferred here and they would be here. In other words, the only consequence is where do I send the case back afterward. Do you agree with that?

MR. NORTH: I think that's the major consequence, and I think you're right. And I think the same thing could be accomplished by severance and then sending them back to the

12:18:31 appropriate jurisdiction, as opposed to Missouri afterwards.

But there is one other wrinkle, Your Honor. The plaintiffs attempted to defeat diversity in that case because they named -- they didn't name a Missouri plaintiff but they 12:18:41 named one Arizona plaintiff. And BPV, Bard peripheral in Tempe, is an Arizona corporation. So vis-a-vis that one plaintiff, there is no diversity.

The plaintiffs did not file a motion to remand in that case, but there is a motion to remand pending in the 12:18:59 40-plus plaintiff case that's coming your way. And we have certainly reviewed the Court's rulings on the other motions to remand and we're no longer removing cases, Your Honor, where there is a non-diverse health care provider on that argument.

But we believe, and a number of courts have 12:19:15 recognized, that this is a totally different situation of fraudulent joinder and misjoinder when you combine multiple plaintiffs with no other relationship to each other, other than an alleged injury from the same group of products, that it's inappropriate to join those and it's a fraudulent attempt 12:19:36 to defeat diversity jurisdiction. And that is a separate line of cases that I believe we will end up briefing in front of Your Honor in the 40-plus plaintiff case. But even though the plaintiffs haven't moved to remand in what was the Oma Hardwick case, that issue is pending there, too, as far as 12:19:56 subject matter jurisdiction.

12:19:57 THE COURT: Well, are you saying in the Hardwick case that I do have, there is an Arizona plaintiff?

MR. NORTH: Yes. One.

THE COURT: So you're going to make two arguments; 12:20:07 right? One is going to be the Arizona plaintiff should be dismissed on the grounds of fraudulent joinder --

MR. NORTH: Yes. I mean, ultimately --

THE COURT: -- and also on the grounds of there's no subject matter jurisdiction in Missouri with respect to that 12:20:20 plaintiff.

MR. NORTH: Yes.

THE COURT: And all the other plaintiffs who aren't from Missouri should be dismissed for lack of subject matter jurisdiction?

12:20:27 MR. NORTH: Right.

THE COURT: And they all should go to their home states, and the five who aren't Arizona plaintiffs should sue there and then get it transferred here. Is that the route we're going --

12:20:39 MR. NORTH: Yes, Your Honor, I believe that's correct. We believe the same result could be accomplished -- now that it's transferred to the MDL, the same result could be accomplished by simply severing the plaintiffs. And there are a number of cases where courts have severed plaintiffs in this 12:20:53 circumstance so that each plaintiff has an individual case.

12:20:56 And at that point the court to could determine to send those cases back to different jurisdictions at that point or --

THE COURT: How do I do that under the language of the statute which says that "Each action so transferred shall 12:21:13 be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." Statute says it has to go back to Missouri. How can I say, no, I'm going to send this one to California?

MR. NORTH: Well, that being the case, Your Honor, 12:21:31 the Court could dismiss them for lack of jurisdiction and they could refile.

THE COURT: But it seems severance wouldn't be a solution. I mean, even if I severed them I'd have to send them all back to Missouri under the statute, which you say has 12:21:43 no jurisdiction over them. Right?

MR. NORTH: You're right, Your Honor. I had not thought of that provision of the judicial panel rules.

THE COURT: Okay. Thank you.

Mr. Lopez.

12:22:05 MR. LOPEZ: Actually, Your Honor, the last point you made was the point I was going to stress, and that is this deals with a unique venue jurisdiction procedural law in the state of Missouri. And there are -- it just happens to be a place where you can consolidate cases, just like you 12:22:24 consolidate cases in Phoenix that are all around the country.

12:22:28 And traditionally, those cases, sometimes they go to the district court and the district court will look at them and apply that law, and I can tell you that I'm not aware of any instance where they've not all got sent back to the state 12:22:45 court from which they came based on Missouri law.

Once in while, as here, the case went to the district court and then there was a motion to make it go to the JPML, which, of course, ended up here.

But I think this is a unique Missouri District Court 12:23:03 issue as to whether or not different plaintiffs from different states can defeat diversity there and allow other plaintiffs -- we can do that in California. If you have a venue plaintiff in California in state court, you don't -- and you have a defendant and you bring in another plaintiff who's 12:23:23 a plaintiff in the state where the defendant's doing business, you can file 50, 60 different plaintiffs from different states. Missouri has the same process, Your Honor.

And the -- if you want me to address my clients there --

12:23:41 THE COURT: You're talking, I think, about the fraudulent joinder issue --

MR. LOPEZ: Right.

THE COURT: -- right?

MR. LOPEZ: I am. And I'm also talking about the 12:23:50 fact you couldn't really sever these cases unless we determine

whether or not remand to the state court and how that process happens before you sever the cases.

THE COURT: Well, what about -- what about the defendant's argument that regardless of fraudulent joinder, under Supreme Court law Missouri can't exercise personal jurisdiction over a defendant when the plaintiff's injuries had nothing to do with Missouri?

MR. LOPEZ: Best I can tell you about that is a 2014 case I haven't read, Your Honor. I know that since -- in 2015 and 2016 the city and county of St. Louis has a number of pharmaceutical and medical device cases where multi-plaintiffs cases were removed to federal court and they all got remanded, and nothing else has happened of them other than to stay in state court and to be litigated as a state court consolidated action.

So I don't know whether that case doesn't apply or says that if a state court has its own venue or jurisdictional issues that the state has the right to determine whether or not they're going to accept other plaintiffs from other states to file as long as they've satisfied the procedural requirements of that state.

I can tell you in Missouri, in that city and that county, since 2014 there have been a number of cases that have been filed there and have stayed there that postdate this *Daimler* case.

So my recommendation would be to maybe send it back to the district court to even hear the remand or the motion.

THE COURT: Hold on just a moment.

I have just had Traci pull up the motion in the other Hardwick case which appears to be at 16-2442. And this motion was filed July 8th, so six weeks ago or so. It's a motion to dismiss.

The question I was going to ask is whether the plaintiffs intend to respond to that motion. It's pending. It's in a case that's been transferred here.

MR. NORTH: Your Honor, the plaintiffs in this particular case are represented by The Driscoll Firm out of St. Louis and not any of the attorneys here.

There is a gentleman by the name of Mr. Phil Sholtz, S-C-H-O-L-T-Z [sic], from The Driscoll Firm who I talked with yesterday, I believe he's on the phone, and I believe he intends to file an opposition and had not done so because it got transferred at the time the motion was pending.

THE COURT: Mr. Sholtz, are you on the phone?

MR. SHOLTZ: Yes, Your Honor. This is Philip Sholtz for plaintiff in the Hardwick case.

At the time of the transfer, the response to the motion was not due yet, and then the case did get transferred and closed, and I -- my understanding was there would be a new briefing schedule in this court, and so I would like to

12:27:46 respond to the motion.

THE COURT: Was there an argument made to the MDL panel, by either side, that before this case is transferred the federal district court in Missouri should decide whether 12:27:57 or not it has jurisdiction?

MR. NORTH: Your Honor, we just filed a tag-along action it's and sort of self-executing, the tag-along notice with the panel, and they did not object to the notice and so it was automatically transferred after a week.

12:28:15 THE COURT: All right.

Mr. Sholtz, when is it that you're planning to respond?

MR. SHOLTZ: We could have our response together fairly quickly, Your Honor. I mean ten days from today would 12:28:25 be fine.

THE COURT: All right. Let's say by September 2nd, Friday, September 2nd. Does that work?

MR. SHOLTZ: That works for me, Your Honor.

THE COURT: We have a woman's voice coming through on 12:28:45 the phone, if somebody doesn't have their phone muted.

Mr. North, when is it that your reply can come in if you get the response on September 2nd?

MR. NORTH: Is the 12th a Monday, Your Honor?

THE COURT: Yes.

12:29:06 MR. NORTH: Could we have to the 13th?

12:29:09 THE COURT: Yes. That's fine.

We'll look for the response on September 2nd, reply on September 13th.

Just scanning this motion, it looks as though the 12:29:22 *Daimler* case turned on the distinction between general and specific jurisdiction and that Missouri has no general jurisdiction over, the argument is, over Bard because they don't have, presumably, a continuous and systematic presence there. And there is no specific jurisdiction because the 12:29:41 events related to the plaintiff's injury didn't occur there.

And I'll look at the briefing on that issue and rule when it comes in.

As for the 40-plaintiff case that is headed this way, obviously I can't do anything with that until the case is 12:30:00 here.

Have you already filed a motion to dismiss in that case?

MR. NORTH: Yes, Your Honor. We filed a motion to dismiss and the motion to stay proceedings, and that's why we 12:30:10 know it's coming to you. The district court judge stayed all proceedings until the transfer of the case to you.

They had filed a motion to remand on the very day that the judge stayed the case, so we have not filed a response to that under those circumstances.

12:30:26 THE COURT: Okay. Let's -- I'm going to be setting

another case management conference in mid October. Let's plan to talk then about where the briefing is on that case and what issues need to be resolved. But I'll go ahead and address this motion to dismiss after we get the briefing done.

Okay. Let's talk for a moment about the other issues. You mentioned privilege disputes and you thought you could get the issues resolved by September 28, and if not, you'd let me know. I think that's fine. I will note in the order that comes out after today that you ought to get those resolved by the 28th. And if there are outstanding issues remaining as of that date, you should call me so we don't have those interfering with the close of discovery.

The next issue is the duplicative filings where it's indicated some plaintiffs are in more than one case in this MDL. The defendants suggest that one of the cases should be dismissed under the first-filed rule. The plaintiffs indicate you're not sure it's a problem now, but if it is we should just consolidate it.

The question I have is whether you're talking about a situation where one plaintiff is in two cases represented by two different lawyers or you're talking about one lawyer having filed the same case twice.

MR. NORTH: Two different lawyers, Your Honor. I would note that in advance of this conference and before we included this, I sent a letter out to every attorney involved

in one of those cases saying if they didn't dismiss one of those cases and work out this conflict, I intended to raise it with the Court. I'm happy to report half of them have since been dismissed. So there are only three of those cases pending. But there are separate lawyers representing the plaintiff in each case for those three plaintiffs.

THE COURT: Okay. What I want to do with those three is this: I would like to direct the plaintiffs steering committee to have a conversation with the lawyers in those three cases.

Obviously, it has to be resolved one way or the other. We can't go forward with two cases represented by two different lawyers. And consolidation isn't the answer, in my view, because then you've still got two lawyers purporting to each represent the plaintiff. Unless they want to team up and jointly represent them in a single case, in which event just dismiss one and have the lawyer appear in the other. But I don't think we ought to continue on with two cases with two different lawyers.

So let's have somebody on the plaintiffs steering committee designated to talk to those three and I'll ask you to give a status report in mid October as to what's happened with them. And if we have a situation where two plaintiffs lawyers won't agree, then I'll allow a motion to be filed and I'll decide what ought to happen with those.

12:33:20 Let's come back, then, for a moment to the objection issues that we talked about. Those are the plaintiffs' objections with respect to FDA related discovery, NBC related discovery, and third-party financing.

12:33:43 I think it probably does make sense to get you to brief this issue fairly quickly. I want to make sure I consider the cases that have been decided in these areas. I don't think the briefing needs to be extensive. It seems to me for the three issues nine page memoranda ought to do it on

12:33:59 each side. You don't have to describe cases. Cite them and I'll read them. And my intent would be, unless it's unreasonable, to have you file simultaneous nine page memoranda by Friday on this issue. If you've got things and you can't get to it, we can push it back a week. But I don't

12:34:19 want this to linger too long.

MR. STOLLER: As much as we'd like a prompt resolution on this, Your Honor, I think we'll need the time until next week on our side.

THE COURT: All right. Let's say simultaneous nine

12:34:31 page memoranda by a week from Friday. September 2nd.

Okay. Let me raise just a couple of other issues and then I'll let you raise others that you want to.

We have received notices of the deaths of plaintiffs in three cases. The first was filed in late June, another at

12:35:13 the end of July, another just a couple of days ago. All we

12:35:19 have gotten are the notices. What is it that you all are expecting we should do with those three cases? I guess that's a question directed to plaintiffs' counsel.

MR. BOATMAN: Your Honor, I think it's going to be 12:35:36 the situation where each plaintiff's counsel is going to have to determine if the death is either related to the filter, in which case the claim would turn into a wrongful death claim, or, if, under the applicable state law, a claim survives the death of the plaintiff and make the appropriate amendment to 12:35:56 the complaint or a dismissal of the complaint, depending upon the state law.

THE COURT: Any disagreement with that from the defense counsel?

MR. NORTH: None, Your Honor.

12:36:10 THE COURT: All right. Then what I would like to do is this: Again, I would like to task the plaintiffs' steering committee with communicating with the plaintiffs' lawyers for these three plaintiffs and ask them to make a decision and take a position in a filing with the court on that issue 12:36:27 before the next status conference in mid October.

The three plaintiffs are John L Kuhn, K-U-H-N, Junior; Olan, O-L-A-N, Jones; and Anthony C. Docimo. D-O-C-I-M-O.

So if the steering committee could communicate to 12:36:53 those plaintiffs' counsel that I would like them, by the next

status conference, to file something with the court indicating whether or not this becomes a wrongful death claim or they believe under the state law they have a surviving claim for damages, then we'll at least know where those stand. And I will ask the parties in their joint report to address that.

Okay. Plaintiffs counsel, do you have other matters besides setting that next conference that we ought to address today?

MR. LOPEZ: Your Honor, at the end of September we're supposed to report to you on the state of our PLC, PSC, and give you a report on that. September is a crazy month and we want to make sure that that report is detailed. Mr. Boatman and I consulting with consultants on the time and billing and all that sort of stuff. If we could put it off until October 31st, 30 days, it will allow us to give you a more detailed report.

I can just report to you everything's going splendidly within our PLC. People are cooperating, people are paying their assessments, people are stepping up and doing whatever it is we need and ask them to do on discovery, experts, covering, things like that. So I can tell you generally things are going quite well over the last 11-plus months.

THE COURT: That's fine. We'll have the report due, then, by October 31st, and I'll put that in the order.

MR. LOPEZ: Thank you.

THE COURT: Anything else you all want to raise from the plaintiff side?

MR. STOLLER: No, Your Honor.

THE COURT: Okay.

How about from the defense?

MR. NORTH: Nothing further, Your Honor.

THE COURT: Okay.

Let's set a date for the next conference.

How about Friday, October 14th at 10 a.m.? Does that work?

MR. LOPEZ: We were hoping that would be one of the dates.

MR. STOLLER: Perfect, Your Honor.

MR. NORTH: Your Honor, that's fine. I'm presently set for trial in an unrelated matter in Georgia on October 10th. My hope would be that the case would be finished by then and I can be here. I certainly can send team members if I can't.

THE COURT: Okay. Why don't we do that. The next week I can't do it. I want to have it at least a week or two before the close of discovery deadline. So let's go ahead, and if you can't make it, we'll have other counsel cover it.

MR. NORTH: Thank you, Your Honor.

THE COURT: We'll set it for October 14th at 10 a.m.

12:40:39 All right. I will get an order out reflecting what we've discussed. Thank you all.

ALL: Thank you, Your Honor.

(End of transcript.)

12:40:47 * * * * *

C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 1st day of September, 2016.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter